A

Chan Yoke Sim v Choong Teck Fook & Ors

B

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-723 OF 2011
HASHIM HAMZAH JC
16 MAY 2013

C

Tort — Defamation — Libel — Claim for damages and injunction against further publication of tortious statements — Publication of statements which imputed that claimant misused kindergarten funds — Elements of defamation of tort — Whether statements made were defamatory to claimant — Whether statements alleged were true — Whether makers of defamatory statements protected by defence of qualified privilege

D

In the present claim, the plaintiff, a kindergarten teacher in Tadika Emmanuel ('TE') sought for damages against the defendants for tort of defamation. TE was established by Emmanuel Baptist Church ('the church') and was administered and managed by the Management Committee of Emmanuel Baptist Church ('TE Board'). The church was sued in the name of the second and third defendants who were the Vice Chairman of the TE board and the secretary of the church, respectively. The fourth defendant was the treasurer of TE. Upon the plaintiff's resignation, the plaintiff alleged that the defendants made and published defamatory statements which imputed that she had dishonestly received her September salary twice from TE; had misused TE's funds to purchase a bank draft for her son who was studying in Australia; had misappropriated funds for TE and therefore committed a criminal breach of trust; had repeatedly committed fraud on the accounts of TE; had committed misfeasance and wrong; was a person of no morale and principle; and was corrupt, untrustworthy and guilty of abusing her position in TE to make a profit for herself. The plaintiff demanded the church to take necessary actions to clear her name but no actions were taken by the church. The plaintiff demanded an apology from the defendants and that the apology was to be published to the members of the church and claimed for damages and injunction to restrain the defendants from further publishing or causing to be printed or published the defamatory words. The issues that arose for the court's determination were whether the statements made were defamatory to the plaintiff; whether the statements alleged against the plaintiff were true; and whether the defendants in publishing the alleged defamatory statements were protected by the defence of qualified privilege.

E

F

G

H

I

Held, allowing the claim:

(1) The statements seemed to imply that the plaintiff was issued two cheques

in which the first one was reported to be lost but both were cashed in by the same person, namely the plaintiff. This statement if read in its context, seemed to suggest that the plaintiff was corrupt, dishonest, a fraud, untrustworthy and had committed a fraudulent breach of trust by cashing the second cheque which was supposedly not due to her. The alleged statements denoting that the plaintiff had received double salary in respect of her services for September 2006 were defamatory against her (see paras 24 & 28).

(2) The plaintiff reported that she lost her salary cheque and was later repaid by the Chairman of TE Board ('Richard Lee'). After that, a replacement cheque was issued to Richard Lee. The replacement cheque was to reimburse the cheque paid to the plaintiff at that time. The plaintiff was then alleged to have cashed both cheques and had taken double salary. The purpose of the replacement cheque was hearsay evidence and Richard Lee was not called in as a witness. There was a replacement cheque issued to Richard Lim for an unknown purpose and the investigation carried out could not verify that the plaintiff had actually cashed in both the cheques (see paras 59–60).

(3) The fact that the cheque was issued to Richard Lee was never disputed yet the imputation was made against the plaintiff. Furthermore, Richard Lee was never called to testify. There was no clarity as to the plaintiff's innocence nor was there any suggestion for the church to clear her name which had been tainted. No apology was ever issued. The plaintiff demanded for an apology from the defendants but no action was taken. The plaintiff then had no other recourse than to bring this matter to trial in order to clear her name. Yet, the conduct of the defendants up until the trial was indifferent towards the imputation made against the plaintiff (see para 74).

(4) The investigations conducted were flawed and since the defendants still published the said allegations against the plaintiff in reliance to their incomplete and flawed investigations, the defendants were indifferent to the truth or falsity of the allegations. This alone was sufficient to constitute malice (see para 61).

(5) The documents were published by persons who had legal duty to disclose such remarks in the form of reports and minutes of meetings which was held in separate occasions. The defamatory statements were published to those who had an interest to receive such material namely the members of TE board which was under the duty to oversee the day to day operation of TE. However, the report and the minutes were made accessible and had in fact been circulated to the general members of the church despite them being labeled as private and confidential, accessible only to the members of the TE board (see paras 42–44).

(6) Even though the publication was not distributed to the general public, all the members of the church were given access to the publication upon request. Although the plaintiff in this case had no prominent standing as a businessman, a politician or even an artist, her husband, brother and her family were devout followers of the church. The effect of these publications would surely affect her, putting her in ridicule or contempt in the mind of the members of the church as being a fraud and untrustworthy. Despite several requests for the church to clear her name, nothing was done by the church (see para 74).

[Bahasa Malaysia summary

Dalam tuntutan ini, plaintif, seorang guru tadika di Tadika Emmanuel ('TE') menuntut ganti rugi terhadap defendan-defendan bagi tort fitnah. TE ditubuhkan oleh Emmanuel Baptist Church ('pihak gereja') dan ditadbir serta diuruskan oleh Jawatankuasa Pengurusan Emmanuel Baptist Church ('Lembaga TE'). Pihak gereja disaman atas nama defendan kedua dan ketiga yang masing-masing merupakan Naib Pengerusi Lembaga TE dan setiausaha gereja. Defendan keempat adalah bendahari TE. Dengan perletakan jawatan plaintif, plaintif mendakwa bahawa defendan-defendan telah membuat dan menerbitkan pernyataan-pernyataan berbaur fitnah yang ditomahkan bahawa plaintif secara tidak jujur menerima gaji bulan September sebanyak dua kali oleh TE; telah menyalahgunakan dana TE untuk membeli deraf bank bagi anak lelakinya yang sedang belajar di Australia; telah menyalahgunakan dana bagi TE dan dengan itu telah melakukan jenayah pecah amanah; telah berulang kali melakukan penipuan akaun TE; telah menyalahgunakan kuasanya dan berbuat salah; seorang yang tidak bermoral dan berprinsip; dan seorang yang tidak berakhlak, tidak boleh dipercayai dan bersalah dalam menggunakan kedudukannya dalam TE untuk mengaut keuntungan bagi dirinya sendiri. Plaintif menuntut pihak gereja untuk mengambil langkah-langkah sewajarnya bagi membersihkan namanya tetapi tiada tindakan yang diambil oleh pihak gereja. Plaintif menuntut satu permohonan maaf daripada defendan-defendan dan agar permohonan maaf tersebut diterbitkan kepada ahli-ahli gereja dan menuntut ganti rugi serta injunksi untuk menghalang defendan-defendan daripada selanjutnya menerbitkan atau menyebabkan untuk dicetak atau diterbitkan, perkataan-perkataan berbaur fitnah tersebut. Isu-isu yang berbangkit untuk diputuskan oleh mahkamah adalah sama ada pernyataan-pernyataan yang dibuat adalah memfitnah plaintif; sama ada pernyataan-pernyataan yang didakwa oleh plaintif adalah benar; dan sama ada defendan-defendan, dalam menerbitkan pernyataan-pernyataan yang didakwa memfitnah tersebut, dilindungi oleh pembelaan perlindungan bersyarat.

Diputuskan, membenarkan tuntutan:

(1) Pernyataan-pernyataan tersebut seolah-seolah memberikan gambaran

bahawa plaintif telah diberikan dengan dua cek, yang pertama dilaporkan hilang tetapi kedua-duanya ditunaikan oleh orang yang sama iaitu plaintif. Pernyataan ini, sekiranya dibaca dalam konteksnya, seperti mencadangkan bahawa plaintiff tidak berakhlak, tidak jujur, seorang penipu, tidak boleh dipercayai dan telah melakukan satu penipuan pecah amanah dengan menunaikan cek kedua yang sepatutnya bukan untuknya. Pernyataan-pernyataan yang menunjukkan bahawa plaintif telah menerima gaji sebanyak dua kali bagi perkhidmatannya dalam bulan September 2006 adalah fitnah terhadapnya (lihat perenggan 24 & 28).

(2) Plaintif melaporkan bahawa dia kehilangan cek gajinya dan keduanya dibayar oleh Pengerusi Lembaga TE ('Richard Lee'). Selepas itu, satu cek ganti dikeluarkan kepada Richard Lee. Cek ganti adalah untuk membayar balik cek yang dibayar kepada plaintif ketika itu. Plaintif seterusnya dikatakan telah menunaikan kedua-dua cek dan mengambil gaji sebanyak dua kali. Tujuan penggantian cek adalah satu keterangan dengar cakap dan Richard Lee tidak dipanggil sebagai saksi. Terdapat cek ganti yang dikeluarkan kepada Richard Lee bagi sebab yang tidak diketahui dan siasatan yang dijalankan tidak dapat mengesahkan yang plaintif telah menunaikan kedua-dua cek (lihat perenggan 59–60).

(3) Fakta bahawa cek dikeluarkan kepada Richard Lee tidak disangkal tetapi perkaitan dibuat terhadap plaintif. Tambahan lagi, Richard Lee tidak dipanggil untuk memberi keterangan. Tiada pencerahan mengenai kebersalahan plaintif mahupun sama ada terdapat sebarang cadangan oleh pihak gereja untuk membersihkan namanya yang telah tercemar. Tiada permohonan maaf yang dikeluarkan. Plaintif menuntut untuk permohonan maaf daripada defendan-defendan tetapi tiada apa-apa langkah yang diambil. Plaintif tiada jalan lain melainkan membawa hal perkara ini ke mahkamah untuk membersihkan namanya. Namun begitu, tindakan defendan-defendan hingga kini masih sama terhadap perkaitan yang dibuat mengenai plaintif (lihat perenggan 74).

(4) Siasatan yang dijalankan adalah cacat dan memandangkan defendan-defendan masih menerbitkan dakwaan-dakwaan terhadap plaintif bersandarkan pada siasatan mereka yang tidak lengkap dan cacat, defendan-defendan tidak berganjak daripada kebenaran atau kesalahan dakwaan-dakwaan tersebut. Ini sahaja cukup untuk terjumlah di bawah niat jahat (lihat perenggan 61).

(5) Dokumen-dokumen tersebut diterbitkan oleh pihak-pihak yang mempunyai kewajipan undang-undang untuk mendedahkan pernyataan-pernyataan sedemikian dalam bentuk laporan dan minit-minit mesyuarat yang diadakan dalam masa-masa yang berbeza. Pernyataan-pernyataan fitnah tersebut diterbitkan kepada mereka yang mempunyai kepentingan untuk menerima material-material tersebut

iaitu ahli-ahli Lembaga TE yang mempunyai tugas untuk menyelia operasi harian TE. Walau bagaimanapun, laporan dan minit-minit tersebut boleh diakses dan malahan telah diedarkan kepada ahli-ahli awam gereja walaupun kesemuanya dianggap sulit dan rahsia, boleh diakses oleh ahli-ahli Lembaga TE sahaja (lihat perenggan 42–44).

(6) Walaupun penerbitan tersebut tidak disebarkan kepada orang awam, kesemua ahli gereja diberikan akses kepada penerbitan tersebut dengan permintaan. Walapun plaintif dalam kes ini bukanlah ahli perniagaan terkenal, ahli politik mahupun artis, suaminya, saudara lelakinya dan keluarganya merupakan pengikut tegar gereja. Akibat penerbitan-penerbitan tersebut sudah tentu memberi kesan kepadanya, menyebabkan dia diejek atau dihina dalam pemikiran ahli-ahli gereja sebagai penipu dan tidak boleh dipercayai. Walaupun beberapa permintaan telah dibuat agar pihak gereja membersihkan namanya, tiada apa yang dilakukan oleh pihak gereja (lihat perenggan 74).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377, HC (refd)
Adam v Ward [1917] AC 309, HL (refd)
Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor [2008] 3 MLJ 492; [2008] 3 AMR 663, CA (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Chan Cheen Ken & Anor v Cristlina @ Cristilla Korok & Anor [2013] 7 MLJ 237, HC (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22; [2000] 6 CLJ 433, HC (refd)
Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1) [2012] 10 MLJ 203; [2012] 1 LNS 296, HC (refd)
Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561; [2006] 1 AMR 189, HC (refd)
Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor [1998] 1 MLJ 176, HC (refd)
Datuk Harris bin Mohd Salleh v Datuk Mohd Shafie bin Hj Apdal & Ors [2009] 7 MLJ 371; [2009] 1 AMR 317, HC (refd)
Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor [2013] 3 MLJ 534, HC (refd)
Horrocks v Lowe [1975] AC 135, HL (refd)

Insas Bhd & Anor v David Samuels & Ors [2005] 1 MLJ 115, HC (refd)
Joceline Tan Poh Choo & Ors v Muthusamy [2003] 4 MLJ 494; [2003] 3 CLJ 705, CA (refd)
John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108, FC (refd)
K Sila Dass (Susulin @ M Siladoss) v Alliance Bank Malaysia Bhd & Ors and other suits [2012] 10 MLJ 853, HC (distd)
Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit [2013] 8 MLJ 199, HC (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394, HC (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals [1995] 2 MLJ 493, CA (refd)
Nevill v Fine Arts and General Insurance Co Ltd [1895] 2 QB 156 (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor [2013] 8 MLJ 348, HC (refd)
Youngerwood v Guardian Newspapers Ltd (unreported) (refd)
Yussoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 TLR 58 (refd)

Legislation referred to

Rules of Court 2012 O 78 r 3(3)
Rules of the High Court 1980 O 78 r 3(3)
Societies Act 1966 s 9(c)

Yee Mei Ken (Teh Lay Kheng & Izzati Tajuddin with him) (Teh, Kiu & Partners) for the plaintiff.
Lee Min Choon (Lee Min Choon & Co) for the third defendant.

Hashim Hamzah JC:

INTRODUCTION

[1] The plaintiff filed this action against the defendants on 20 June 2011. By way of a notice of discontinuance dated 8 November 2011, the name of the first defendant was struck out from the writ. In this action the plaintiff claims for damages against the defendants based on the law of defamation.

PARTIES

[2] The plaintiff was a teacher in Tadika Emmanuel ('TE'), a kindergarten, from September 1999 to April 2007. The plaintiff was not a member of the Church. TE was established by Emmanuel Baptist Church, a Christian Church, registered as a society and has an address at No 14, Jalan Padang (4/48D), 46050 Petaling Jaya, Selangor ('the Church'). TE at all material times was administered and the day to day running of TE was managed by a management board called the Management Committee of Emmanuel Baptist

Church ('TE Board'). The church is sued in the name of the second and third defendants, its office bearers, as required and provided under s 9(c) of the Societies Act 1966. The second defendant was at the date of filing of this action the vice chairman of the TE Board. The third defendant was at the date of filing of this action the Secretary of the church. The fourth defendant was the Treasurer of TE from 2001 to 2007.

BRIEF FACTS

[3] Upon the plaintiff's resignation as a teacher in TE in April 2007, the plaintiff alleged that the defendants made six defamatory statements against the plaintiff which imputed that the plaintiff during her employment had:

(a) misused TE's funds for personal purchase of an overseas bank draft for her son studying in Australia; and

(b) received twice her salary for the month of September 2006.

[4] The plaintiff alleged that the defendants had published or caused to be published the following documents which contain defamatory statements against the plaintiff, namely:

(a) a memorandum to the members of the TE Board entitled *Maintenance of TE Financial Records and Outsourcing Arrangement* published by the fourth defendant somewhere in October 2007 ('the 2007 memorandum');

(b) an undated audit report for TE accounts for year end 2006/2007 caused to be published by one Steven Leong. ('the audit report');

(c) the minutes of a meeting entitled Minutes of the Tadika Meeting dated 23 November 2008 ('the 2008 Minutes');

(d) the minutes of a meeting attended by the members of the TE Board entitled *Minutes of the Tadika Emmanuel (TE) Board Meeting with Fact Finding Team Held on Saturday, 28 February 2009 in the TE Office* (the 2009 Minutes);

(e) a report entitled *Fact Finding Report on Kindergarten Accounts to the Church Management Committee* dated 1 February 2009 (the 2009 fact finding report); and

(f) An addendum to the 2009 fact finding report entitled 'Addendum to the fact finding report on Tadika Emmanuel Accounts after the Church Management Committee Meeting on 8 February 2009 and after the fact finding team's meeting with the TE board on 28 February 2009 and with Bro RL and sis YKL on 23 April 2009' dated 23 April 2009.

('the addendum to the 2009 fact finding report')

[5] As a result, the plaintiff sought legal advice and the plaintiff's former solicitors had issued a letter dated 26 October 2010 to the church demanding the church to take necessary actions to clear the plaintiff's name but no actions were taken by the church.

[6] The plaintiff proceeded to appoint another solicitor and later filed this action on 20 June 2011 to claim against the defendants the following relief:

(a) that an apology be made by the defendants to the plaintiff and the apology is to be published to the members of the church;

(b) general damages;

(c) aggravated damages;

(d) interest;

(e) injunction to restrain the defendants by themselves, their agents, servants, or otherwise from further publishing or causing to be printed or published the defamatory words; and

(f) costs.

ISSUES TO BE TRIED

[7] The parties agreed that the issues to be tried in the present case are as follows:

(a) whether all the statements were defamatory to the plaintiff;

(b) whether the statements alleged against the plaintiff were true; and

(c) whether the defendants in publishing the alleged defamatory statements were protected by the defence of qualified privilege.

FINDINGS

[8] In an action for libel, the burden of proof lies on the plaintiff to prove that:

(a) the words or statements as contained in the articles are defamatory;

(b) the words or statements complained of as contained in the articles refer to the plaintiff; and

(c) the words or statements as contained in the articles were published to a third party.

[9] For ease of reference to the abovementioned principles, please see the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC) at p 316 and several cases which followed the principles in *Ayob bin Saud*'s case, for instance *Kian Lup Construction v Hong Kong Bank Malaysia Bhd* [2002] 7 MLJ 283 (HC), *Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit* [2013] 8 MLJ 199 (HC) and *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534 (HC).

Whether the words or statements complained of as contained in the articles refer to the plaintiffs

[10] Before dealing with the first and the third element as mentioned above, it is important to note that the parties have agreed and it was never disputed that all the alleged defamatory statements referred to the plaintiff.

Whether the words or statements as contained in the articles are defamatory

[11] The plaintiff alleged that the following passage in the 2007 memorandum to be defamatory to her, which is:

> Note: Monies received should be banked in the soonest possible. In this regard, any temporary usage of cash receipts is not permitted. (Past instances whereby TE teacher initially peruses the cash collection for personal purchase of overseas bank draft should not recur). (the Alleged first Defamatory Statement)

[12] The plaintiff alleged that the following passage in the audit report to be defamatory to her, namely:

> It was reported that cheque No 4279 payable to one of the staff was reported lost and was subsequent replaced by another Cheque No 456690 for the same amount of RM831.25. However, upon verification of the Bank statement shows that both cheques was cleared on 24 November 2008 and 1 December 2008 respectively. As the staff who has withdrawn monies for both cheques had resigned, the Treasurer brought up this issue to the TE Board and this amount was expense off to Salary A/C. (the alleged second defamatory statement)

[13] With regard to the 2008 minutes, the plaintiff alleged these passages to be defamatory to her:

> During Sis Jenny Toh's time — one year principal (2005), a teacher uses the collected fees to buy bank draft for her son studying in Australia. Money in transit was recorded previously without bank slips. After some time, the bank slips were

submitted; it is hard for the treasurer to track. At present moment, all bank slips are to be attached and all details are to be written. (the alleged third defamatory statement)

[14] The plaintiff alleged these passages to be defamatory to her in the 2009 Minutes:

iii. Purported usage of TE fees collection for the purchase of personal bank draft (Refer to item 6.3 of the Fact Finding Report and Appendix F).

Bro. BC said TE previous Treasurer, sis. Ang Hwee Loo (AHL)'s allegation was a very strong and sensitive one as the teacher she referred to was bro. CYH's sister. The Fact Finding Team could not conclude that the purported bank draft was in fact related to the discrepancy being written off in Point 7 of Appendix C, or the purchase of personal bank draft actually happened.

v. Salary for Sep-06 was alleged to have been paid twice to a teacher (Refer to 6.5 of the Fact Finding Report and Appendix G & H).

Bro. BC in referring to item 3.1 of the Audit Report (Appendix I) said the audit observation has given the impression of the salary cheques being issued twice to a teacher when actually the alleged replacement cheque was issued to bro. RL as a reimbursement for a different amount. Bro. BC said there were two aspects to this finding. firstly, sis. AHL admitted to the Fact Finding Team that she had omitted to cancel the first salary cheque that was reported lost. secondly, although the second reimbursement cheque to bro. RL included an amount of the teacher's salary for Sep-06, there was no voucher to evidence the second salary payment purportedly to have been made in cash. Therefore, the Fact Finding Team could not confirm that the teacher in question has received the Sep-06 salary twice.

Sis. LKK commented that when she joined the TE Board, she remembered being told that the TE accounts were very messy. Sis. LL also recalled that sis. AHL wanted collections to be banked in immediately and teachers were later not allowed to hold any money. Since sis. AHL's allegation of a teacher having used TE money to purchase personal bank draft was never tabled and discussed in the past TE Board meetings, the present TE Board accepted the recommendation of the Fact Finding Team and unanimously agreed that the unsubstantiated allegation be dismissed.

(the alleged fourth defamatory statements)

[15] As regards to the 2009 fact finding report, the plaintiff alleged that a few passages of the minutes were defamatory to her, particularly:

6.3 Purported Usage of TE fees collection for the purchase of personal bank draft

AHL's memo contains a statement (Past instances whereby TE teacher initially peruses the cash collection for personal purchase of overseas bank draft should not recur). (Appendix F - AHL's memo to members of TE Board in October 2007)

6.5 Salary for Sep-06 was alleged to be paid twice to a teacher

AHL's bank reconciliation (Appendix G) stated that due to 'PBB 004279 for RM831.25 was reported lost and hence cancelled, the teacher was prepaid by RL in Nov-06. RL was then reimbursed on 23 November 2006 via TE cheque PBB 456690 (Appendix H - Payment Voucher 18194).

Audit Report 3.1 (Appendix I) stated that it was reported that a cheque No 004279 payable to one of the staff was reported lost and subsequently replaced by another cheque No 456690 for the same amount of RM831.25. However, upon verification of the bank statement it shows that both cheques were cleared on 24 November 2006 and 1 December 2006 respectively.

(alleged fifth defamatory statements)

[16] In the addendum to the 2009 fact finding report, the plaintiff alleged that the following passage is defamatory to her:

Addendum (6) to item (6.3) of the fact finding report

(i) The fact finding team is of the view that the purported usage of TE fees collection for the personal purchase of overseas bank draft alleged by the previous TE Treasurer in her memo to the TE Board dated October 2007 was not discussed or investigated by the TE Board. This was confirmed by the fact that it was not mentioned in any of the TE Board minutes. It is therefore not appropriate for the Fact Finding Team to delve further into this issue as this was an unsubstantiated allegation made by the previous TE Treasurer …

(ii) During the Fact Finding Team's meeting with the TE Board on 28 February 2009, the TE Board confirmed that since sis. Ang Hwee Lee's allegation of a teacher having used the TE money to purchase personal bank draft was never tabled and discussed in the past TE Board meetings, the Present TE Board unanimously agreed that the unsubstantiated allegation be dismissed. (alleged sixth defamatory statement)

[17] Having listed all the alleged defamatory words as pleaded by the plaintiff, the next thing to do would be to determine whether these alleged defamatory statements caused to be published by the defendants were in fact defamatory to the plaintiff.

[18] In deciding this issue, I find it pertinent to refer to the decision delivered by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at pp 374 and 375 where it was held that:

In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (See *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.) Richard

Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Or*s [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.

[19] I also find it helpful to quote the decision by Low Hop Bing J (as he then was) in the case of *Abu Samah bin Omar v Zainal bin Montel* [2004] 5 MLJ 377 at p 382 where it was held that:

Whether the words are defamatory?

In respect of this issue, it has been said that there is no precise test applied to determine whether or not any given words are defamatory or are capable of a defamatory imputation. Several general formulations have been accepted and may be stated as follows:

(a) any imputation which may tend to lower the plaintiff in the estimation of right thinking members of society generally (see *SB Palmer v AS Rajah & Ors* [1949] MLJ 6); to cut him off from society or to expose him to hatred, contempt or ridicule (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142);

(b) a defamatory statement is one to a man's discredit, or which tends to lower him in the estimation of others, or to injure his reputation in his office, trade or profession, or to injure his financial credit or if the words cause him to be shunned or avoided: *Yussoupoff v Metro-Goldwyn-Mayer Pictures Ltd* [1934] 50 TLR 58; per Mohamed Azmi J (later FCJ) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58, *Gatley on Libel and Slander* (6th Ed) p 4, as followed by Ramly Ali J in *Kian Lup Construction*, pp 41–42.

[20] It is thus incumbent to determine, in the present case, whether the statements made in all of the alleged defamatory statements against the plaintiff, in their natural and ordinary meaning, impute to her any dishonourable or discreditable conduct or motives or a lack of integrity on her part, tends to lower the plaintiff in the estimation of right thinking members of the society generally, to cut her off from society or to expose the her to hatred, contempt or ridicule and/or to cause the her to be shunned or avoided. The list is of course not exhaustive.

[21] It is also important to bear in mind that in determining whether the statement is capable of being defamatory, the words must be read in its context in which they were used, (see *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394 at pp 403–404 (HC))

[22] The plaintiff in the present case alleged that the all the alleged defamatory statements caused to be published by the defendants, if read in

their ordinary and natural meaning to have the following imputation against the plaintiff, namely to mean that the plaintiff:

(a) had dishonestly received her September salary twice from TE;

(b) had misused TE's funds to purchase a bank draft for her son studying in Australia;

(c) had misappropriated funds for the Tadika and had thereby committed a criminal breach of trust;

(d) had dishonestly and unscrupulously received double salary for the month of September 2006;

(e) had repeatedly committed fraud on the accounts of TE;

(f) had committed misfeasance and wrong;

(g) is a person of no morale and principle; and

(h) is corrupt, untrustworthy and guilty of abusing her position in TE to make a profit for herself.

[23] The defendants on the other hand, contended that the statements that the plaintiff was paid September 2006 salary twice was not in fact defamatory due to the argument that a person will only commit a wrong doing if that person, who after having paid twice, refuses to pay the excess payment when called upon to do so. By cashing in the cheques, it does not imply any wrongful or dishonest conduct. It was also submitted that the plaintiff must bring in evidence to show that the statements were in fact defamatory by bringing in witnesses to testify as such. It was further submitted that the plaintiff failed to quote the whole passage of the statements which seemed to suggest that the allegation made against the plaintiff was unsubstantiated.

[24] With due respect, I disagree with this contention. The statements as can be seen in the alleged second defamatory statement and the alleged fifth defamatory statement seems to imply that the plaintiff was issued two cheques in which the first one was reported to be lost but both were cashed in by the same person, namely the plaintiff. This statement if read in its context seems to suggest that the plaintiff was corrupt, dishonest, a fraud, untrustworthy and had committed a fraudulent breach of trust by cashing the second cheque which was supposedly not due to her.

[25] With regards to the contention that the plaintiff ought to bring in witnesses to the court in order to testify on the effect of statement made against the plaintiff, I find this argument to be without basis. The test to determine whether the alleged words are defamatory is an objective one and ought to be decided by the judge whilst considering the entire alleged defamatory

statements in the context that it was made. I find it helpful to quote the decision in the case of *Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348 where it was held at pp 367–368 that:

> [65] As had been illustrated by the above mentioned cases and authorities the test to be applied in this scenario is an objective test and to be decided by a judge having considered the entire alleged defamatory statements and the context in which it was made. In order to be defamatory of the plaintiffs the alleged defamatory statements must contain an imputation which tends to lower the plaintiffs in the estimation of right-thinking members of society generally.
>
> [66] Therefore in the case at hand, the test whether the alleged defamatory statements were in fact defamatory is what meaning or meanings would it convey to an ordinary and reasonable person. It is an objective test on how the words would be understood. The court is only concerned with the natural and ordinary meaning of the words. The plaintiffs had set out the natural and ordinary of the words at para 9 of the SOC. What would an ordinary reasonable person construe the words in the alleged defamatory statements to mean or to convey? Do the words calculate to expose the plaintiff and or bear defamatory imputation to the plaintiffs discredit, 'or which tend to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of a right-thinking person generally' as illustrated by the book *Gatley on Libel and Slander* (11th Ed).

[26] As regards to the contention that the plaintiff was misleading the court by not producing the entire passage of the alleged defamatory statements in the pleadings, I am of the opinion that this contention cannot stand. It is not expected for the plaintiff to produce the whole passage of a long article. If the requirement is as such, the plaintiff would have to produce the whole article inside of the pleading. This is, of course, not practical. In *Bullen and Leake & Jacob's Precedents of Pleadings,* Vol 1 at pp 510–511, the following passage can be seen, namely:

> Libel — The words must be set out verbatim in the particulars of claim … Where the defamatory words form only part of a longer article or program, the claimant must set out in his particulars of claim only the particular passage of which he complained as being defamatory to him …

[27] Further, in *Atkin's Court Forms* (2th Ed) 1994 Issue at p 96, the following passage is provided, namely:

> Where the words complained of appear in a long article or a book, the plaintiff should plead only those passages which are allegedly defamatory …

[28] Based on all of the above, I find that the alleged statements denoting that the plaintiff had received double salary in respect of her services for September 2006 to be defamatory against her.

[29] Before proceeding any further, it is of utmost importance to note that the defendants conceded that the statements regarding the allegation plaintiff misusing TE's funds to purchase a personal bank draft for her son studying in Australia is defamatory subject to their right to raise the defence of qualified privilege which will be discussed later in this judgment.

Whether the words or statements as contained in the articles were published to a third party

[30] The issue on publication was never disputed by the defendants. However I feel inclined to address this issue for the sake of completeness.

[31] The principles regarding this issue can be seen in the Supreme Court case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 where it was held at p 176 that:

> In order to constitute publication, the defamatory matter must be published to a third party and not simply to the plaintiff. By publication is meant making known of the defamatory matter, after it had been written, to some person other than the person to whom it is written. The uttering of a libel to the party libelled is no publication for the purpose of a civil action.

[32] This principle has been referred to in the recent High Court case of *Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348 at p 369.

[33] In the present case, PW3, the plaintiff's brother testified that he got to know about the alleged misuse of funds when first told by the second defendant. He later told it to her sister, the plaintiff. He testified during examination-in-chief as follows:

> PS1: According to the plaintiff, she first knew about the allegations having told by you?
>
> PW3: Yes.
>
> PS1: How did you find out about it?
>
> PW3: Sunday, 21 December 2008, the second defendant informed me that my sister was involved in the misuse of the church's fund.
>
> PS1: Can I clarify; the second defendant is known as?
>
> PW3: Ben Chong.

PS1: On 21 December 2008, can you recall what was said to you? **A**

PW3: He said that my sister was involved in the misuse of TE fund. He mentioned the amount of RM10,000 and above

[34] In addition, PW3 during cross-examination gave evidence that a copy of the 2009 fact finding report, the addendum to the 2009 fact finding report and the minutes of the meetings were given to him. In particular, he testified as follows: **B**

DS: The defamatory statements were given to her by you? **C**

PW3: Yes.

DS: How did you come into possession of this document?

PW3: The report given by the FFT.

DS: To who? **D**

PW3: To me. Also the second addendum.

DS: You were given a copy of the report by the FFT?

PW3: Yes. The first report, the first addendum but the second addendum was not given. **E**

DS: Why did they give you the fact finding report?

PW3: Because it relates to my sister's allegations.

DS: Were you a member of the TE board? **F**

PW3: No.

DS: Were you a member of the church Council at that time?

PW3: No.

DS: Documents given to you because you were the one who raised the issue? **G**

PW3: Yes.

DS: Before the fact finding report was given to you, did you request for it?

PW3: I can't recall. **H**

DS: You said that you were not a member of TE Board at that time?

PW3: Yes.

DS: How did you come into possession of the minutes?

PW3: Because the church practises transparency. They let me review the minutes. Indirectly I am doing a personal investigation. **I**

DS: So it was given to you by the chairman. What was his name?

PW3: Aaron Chin Yong Sang.

DS: The report given by the FFT and the minutes given by the Chairman of TE Board?

PW3: Yes.

DS: At that time, was it a public or internal document.

PW3: Internal documents that can be viewed by members.

DS: By members meaning what?

PW3: The church's members. They can access to these documents if they write officially.

DS: Apart from you, do you know the documents given to any of the church's members other than you?

PW3: Yes. The church Leaders, the Pastoral Committee Members and any concerned members who want to know.

DS: At that time, the issue of the discrepancy of the church was made public knowledge to the church's members?

PW3: Yes.'

[35] The testimony of PW3 seemed to suggest that members of the church, besides the members of the TE board and also members of the FFT have got access to the documents upon request. Having access does not mean that there is publication. However, based on the evidence of PW3, despite him being supplied with copies of all the said documents, some members of the church were already given copies of the report.

[36] Now I turn to consider the evidence given by DW2, a member of the church at that material time, who gave evidence that she had received a copy of the report from the church. DW2 in particular gave evidence during cross-examination as follows:

PS1: As far as you are aware, do you know the fact finding report?

DW2: Yes.

PS1: Have you read it?

DW2: It is not for everyone to read.

PS1: Have you?

DW2: The first time.

PS1: Yes or No?

DW2: Yes.

PS1: When?

DW2: I cannot remember.

PS1: Look at Bundle B, at p 33, is this the fact finding report?

DW2: It is so much I cannot remember all, but maybe part of it.

PS1: You have seen this before?

DW2: Yes.

PS1: You will remember that the fact fnding tTeam was investigating the allegations, the discrepancy?

DW2: Yes. When fact finding case was on, I cannot confirm this document was given to us. There was one referred to Fact Finding given to me and husband to look through. Whether it's the final one I am not sure.

PS1: Are you saying you read the draft or you have seen it?

DW2: I have seen it.

PS1: Have you seen the report or the draft?

DW2: The Church gave a copy.

PS1: You are a witness here, this document has been given to you, are you saying that you have not seen it at all? Have you seen it? You said yes. Have you seen the report around February 2009?

DW2: Can I correct you; you only gave it this morning.

PS1: I leave this to submission. Anyway you have seen this, can you confirm you have seen it?

DW2: Yes.

[37] Based on all of the above and the evidence before me, I am satisfied that there was a publication by the defendants of the defamatory statements to third parties especially when all the documents were given to PW3, the plaintiff's brother. Based on the evidence by PW3, some members of the church were also provided copies of the documents supported by the evidence given by DW2 during cross-examination. Based on the evidence before me, I am satisfied that the third element of defamation is established.

THE DEFENCE OF QUALIFIED PRIVILEGE

[38] The defendants submitted that the defamatory statements especially on those involving the misuse of TE's funds by the plaintiff to purchase a personal bank draft in favour of her son studying in Australia are protected under the notion of qualified privilege.

[39] In the leading case of *Adam v Ward* [1917] AC 309 at p 334 the defence of qualified privilege was defined as 'a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom

it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.' (See also *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108, *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, and *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 at p 297)

[40] Wan Hamzah SCJ (as His Lordship then was) in the Supreme Court case of *S Pakianathan v Jenni Ibrahim* at p 178 had this to say:

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v Bush* (1885) 5 E & B 344; 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v Ward* [1917] AC 309 334.

[41] These principles had been categorised under the three tests as outlined by Abdul Malik Ishak J in the case of *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561 at p 590; [2006] 1 AMR 189 (HC) at pp 211–213 which must be satisfied, namely:

> It follows that in our judgment, when applying the present English common law of qualified privilege, the following questions need to be answered in relation to any individual occasion.
>
> 1. Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test).
> 2. Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test).
> 3. Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this the circumstantial test).'

[42] It was submitted by the defendants that all the documents were published by persons who have legal duty to disclose such remarks in the form of reports and minutes of meetings which was held in separate occasions. I agree with this preposition. The duty of an auditor in the present case, for

instance, is to audit the account of TE and to highlight any discrepancies in TE's account during the particular accounting year. One of the duties of the Treasurer is also to raise such discrepancies during the meeting of the TE board and of course, the fact finding committee which was established to investigate on such discrepancies has the duty to publish the report of their investigation. I am satisfied that the duty test is established.

[43] The defamatory statements were published to those who have an interest to receive such material namely the members of TE board which was under the duty to oversee the day to day operation of TE. The interest test is also established.

[44] With regard to the third test which is the circumstantial test, I find no hesitation to hold that the nature, status and the source of the documents were such to be protected in the absence of proof of express malice. Auditing reports or minutes recorded during meetings should be protected on the grounds of public policy. In a meeting, parties who have interests over any matter should be given the opportunity and the freedom to express their concerns over any matter provided that the first and the second test have been satisfied. This is so much so when the fact finding report was labelled as private and confidential and was supposed to be accessible only to the members of TE board and the FFT who had interest over the said matter. However, the problem in the present case was regarding the circumstances of the publication. In the present case, the report and the minutes were made accessible and had in fact been circulated to the general members of the church despite them being labelled as private and confidential, accessible only to the members of the TE board. Since the report was made available to members of the church who has no interests whatsoever over the matter, I am therefore unable to hold that the circumstantial test has been duly established.

[45] Therefore I am of the view that in the first instance, the publication made by the church with regards to the minutes and the reports had failed the third test in invoking the defence of qualified privilege. However, I would still proceed in determining the issue on malice.

PRESENCE OF MALICE TO NEGATE THE DEFENCE OF QUALIFIED PRIVILEGE

[46] The plaintiff pleaded that the defendants cannot rely on the defence of qualified privilege since the publication was made with malicious intention.

[47] Again in the case of *Adam v Ward*, Lord Finlay LC at p 318 clearly connotes the general overview with regards to malice and the defence of qualified privilege by stating as follows:

> The law of privilege is well settled. Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified, and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury.

[48] The principles above was also adopted in the recent case of *Chan Cheen Ken & Anor v Cristlina @ Cristilla Korok & Anor* [2013] 7 MLJ 237 (HC).

[49] The next question to be asked is what constitutes malice? The general definition of malice was discussed by Mohd Ghazali Mohd Yusof JCA in delivering the judgment of the Court of Appeal in the case of *Anne Lim Keng See v The New Straits Times Press (M) Bhd & Anor* [2008] 3 MLJ 492; [2008] 3 AMR 663 at pp 518 (MLJ); 684–690 (CLJ) had this to say:

> What is malice? According to *Osborn's Concise Law Dictionary* (7th Ed) the word 'malice' means:
>
> > Ill-will or evil motive: personal spite or ill-will is sometimes called actual malice, express malice, or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v Pickles* [1895] AC 587).

[50] Provisions regarding malice in defamation law was also provided under O 78 r 3(3) of the Rules of the High Court 1980 ('RHC') (which is in pari materia with the O 78 r 3(3) of the Rules of Court 2012) where it was provided that:

> Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

[51] This provision specifically requires for the plaintiff to give particulars of the facts and matters from which malice is to be inferred. In law, this is known as express malice or malice in fact. It must be borne in mind that failure to comply with this provision is fatal to the plaintiff's case, (see *Datuk Harris bin Mohd Salleh v Datuk Mohd Shafie bin Hj Apdal & 4 Ors* [2009] 7 MLJ 371; [2009] 1 AMR 317 at p 325).

[52] For the sake of completeness, in defining the term malice in law and malice in fact in the law of defamation, I find it helpful to refer to the decision by Arifin Zakaria J (as His Lordship then was) in the case of *Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor* [1998] 1 MLJ 176 at p 183 where it was held that:

> From the authorities, there is a distinction drawn between express malice and malice in law. The latter kind of malice may be presumed from the fact of the publication of defamatory words, so that the plaintiff need not prove it (see *Belt v Lawes* (1882) 51 LJ QB 359 (DC); whereas express malice which is actual malice or malice in fact has to be pleaded and proven by the plaintiff. I agree with the submission of learned counsel for the plaintiff that O 78 r 3(3) of the RHC refers to this latter kind of malice and not to malice in law.

[53] It was pleaded in the reply to the statement of defence dated 10 August 2011 and further submitted by the plaintiff that the particulars of malice were as follows:

(a) the publication in the 2007 memorandum, the first defamatory statement published against the plaintiff, was made by the fourth defendant without any prior investigations being carried out;

(b) despite there being no investigation being carried out at first, the defendants continued on publishing the statements;

(c) the fourth defendant admitted that the account for TE was not properly audited until 2007 therefore there was no basis to allege that the plaintiff was the one who had misused the funds;

(d) the investigation conducted by the FFT was based on a tampered voucher allegedly fabricated by the defendants;

(e) continuous publication of the defamatory statements, even though the FFT came out with a report that the allegation made against the plaintiff was unsubstantiated;

(f) the second cheque was issued to one Richard Lim as a reimbursement for advancing payment of the September 2006 salary to the plaintiff and not to the plaintiff;

(g) the defendants allege that there was an admission through a conversation

between the plaintiff and PW1 that the plaintiff had taken TE's funds to purchase personal bank draft but evidence given by PW1 were shown to the contrary;

(h) the plaintiff was never afforded an opportunity to defend herself since she was never called to explain herself during the investigation by FFT; and

(i) there was no attempt to clear the plaintiff's name to vindicate all the wrongful accusations made against her.

[54] As highlighted in *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156 at p 171, per Lopes LJ:

> The effect of the occasion being privileged is to render it incumbent upon the plaintiff to prove malice, that is, to shew some indirect motive not connected with the privilege, so as to take the statement made by the defendant out of the protection afforded by the privileged occasion. This he may do either by extrinsic evidence, by which I mean something outside the statement itself, or by intrinsic evidence, by which I mean something contained in the statement itself.

[55] In view of the evidence before me, I find the evidence given by the fourth defendant during cross-examination to be of particular importance whereby the fourth defendant admitted that the basis of her allegation made against the plaintiff was only based on a conversation that she had with DW2, the principal of TE at that material time. The relevant part of the evidence is as follows:

> PS1: When you say this, your knowledge of this incident, where did it come from?
>
> DW3: Through the principal, Yong Kim Leng, via telephone.
>
> PS1: When I say your evidence, you refer to the telephone conversation, correct?
>
> DW3: Yes.
>
> PS1: You made that statement by reason of what Yong Kim Leng have told you?
>
> DW3: Yes.'

[56] It can be seen from the evidence that no prior investigation was conducted to ascertain the truth before the allegation was made by the fourth defendant. Even when the FFT was formed to investigate the matter, the plaintiff was not even called to answer the allegations made against her. She was not even a part of the investigation. This can be seen from the evidence given by DW1, who was also a member of the FFT, during cross-examination where he gave evidence as follows:

> PS1: Who did you speak to with regards to these allegations?

DW1: We talked to the internal auditors Steven Leong, on salary payment. We checked the TE payment vouchers. We talked about the payment vouchers. We talked to Richard Lee and Kim Leng.

PS1: You never, didn't speak to my client?

DW1: No.

[57] When asked about the reasons behind not calling the plaintiff at least to answer the allegations made against her, DW1 during cross-examination testified that:

PS1: Before the fact finding report, why didn't you speak to my client? She is being accused in these allegations.

DW1: We see that there is no issue, since it was never discussed, never tabled in the TE Board meeting so we want to dismiss it.

PS1: What are you saying now was only possible after your investigation. To carry out an investigation, why didn't you give her a chance to answer the allegations before you prepare the report.

DW1: I have no answer to that.

PS1: Can I suggest that it is not necessary?

DW1: We think that it is not necessary after going through the records.

[58] Based on the above, I have no hesitation to hold that in the first instance, there was no investigation carried out before the allegation was made by the fourth defendant. Even after the FFT was set up to carry out investigations on the said allegations, the investigation was not properly done. The investigation was too one-sided and the plaintiff as the aggrieved party was never called to clarify the matter. The purpose of the investigation is very much questionable.

[59] In addition, based on the evidence given by DW1, the plaintiff reported that she lost her salary cheque and was later repaid by Richard Lee, the chairman of TE board at that material time. After that, a replacement cheque was issued to Richard Lee. DW1 testified that Richard Lee told him that the replacement cheque was to reimburse the cheque paid to the plaintiff at that time. However, DW1 stated that the knowledge on that matter only came in later after FFT's investigation. The plaintiff was then alleged to have cashed both cheques and has taken double salary.

[60] I shall not consider the evidence given with regard to the purpose of the replacement cheque since it is a hearsay evidence and Richard Lee was not called in as a witness. One thing I can confirm with regard to this evidence is

that there was a replacement cheque issued to Richard Lim for an unknown purpose and the FFT cannot verify that the plaintiff had actually cashed in both the cheques.

[61] Based on the above, the plaintiff submitted that there was something wrong with the way things were going with regard to this issue and raised that there was a possibility that the plaintiff was used as a scapegoat to cover up the dishonest conduct and the misuse of the TE's funds by the said Richard Lee. I would not go on so far as to decide this issue, but I am very much convinced based on all the evidence before me that the investigations conducted were flawed and since the defendants still published the said allegations against the plaintiff in reliance to their incomplete and flawed investigations, I find no hesitation to hold that the defendants were indifferent to the truth or falsity of the allegations. This alone is sufficient to constitute malice.

[62] Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at p 150 had this to say:

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity.'

[63] It was further held by Lord Diplock, with regards to the test in determining malice that:

> … whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive.

[64] In addition, Abdul Malik Ishak J in the case of *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* quoted the judgment, in chambers, of Eady J in *Youngerwood v Guardian Newspapers Ltd* (unreported), 13 June 1997 where it was held that:

> Conversely, unverified information from unidentified and unofficial sources may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such sources, the publisher undertakes a heavy burden in showing that the publication is fairly warranted by any reasonable occasion or exigency.

[65] In the case of *K Sila Dass (Susulin @ M Siladoss) v Alliance Bank*

Malaysia Bhd & Ors and other suits [2012] 10 MLJ 853 (HC) it was held by Lau Bee Lan J at pp 869–870, specifically on the factual circumstances to determine the existence of malice that:

> I find the plaintiff has failed to establish malice on the defendants' part for two reasons:
>
> (a) the defendants have investigated the matter thoroughly to ascertain the identity of the true culprit before issuing the letters of complaint; and
>
> (b) there is justification for the letters of complaint to be copied to the Bar Council and Messrs Leong Yeng Kit & Co by the first defendant.
>
> I find based on the evidence which I have alluded to earlier, the defendants had investigated into the matter by (i) the first defendant repeatedly contacted the firm to ask for the return of the security documents; (ii) demanded for an explanation from the firm when the first defendant discovered that the presentation slips were fictitious. In fact prior to lodging the complaint, (i) the first defendant took the initiative to make inquiries at the relevant land offices; and (ii) the second and third defendants even went to the firm's office to look for the relevant files but were made to wait and were unattended to.

[66] The facts in the above case and in the present case are distinguishable. In *K Sila Dass*, reasonable and thorough efforts were taken to ascertain the truth regarding the identity of the culprits before any action was taken against them. However, in the present case, as mentioned above, the investigations were not conducted properly. Allegations were made based on unconfirmed and unverified sources. In addition, regardless of whether the allegations were true or not, the statements were continuously published against the plaintiff. The report was also made available to the general members of the church. Therefore, I am of the opinion that based on all of the above, the defence of qualified privilege must fail since the publications of the allegations against the plaintiff were actuated by malice.

QUANTUM OF DAMAGES

[67] With regard to this issue, the plaintiff in the present case pleaded the sum of RM200,000 to be awarded as general damages and RM100,000 to be awarded as aggravated damages.

[68] In the law of defamation, it is trite law that the plaintiff need not plead or prove damage if the claim is for general damages, (see *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals* [1995] 2 MLJ 493 (CA) at p 531).

[69] Therefore, the determination on the issue of quantum of damages for general damages is solely within the discretion of the judge. However, these

A factors must be taken into account, including but not limited to:

(a) the position and standing of the plaintiff;

(b) the gravity and seriousness of the libel;

B (c) the mode and extent of the publication;

(d) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(e) the uncertainty undergone in litigation;

C

(f) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(g) the absence or refusal of any correction, retraction or apology.

D

[70] See *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals* at p 524, *Insas Bhd & Anor v David Samuels & Ors* [2005] 1 MLJ 115 at p 137 and also *Joceline Tan Poh Choo & Ors v Muthusamy* [2003] 4 MLJ 494; [2003] 3 CLJ 705.

E

[71] I also find it pertinent to discuss on the issue of aggravated damages here. The main purpose of awarding aggravated damages against the defendants in a defamation suit is to send a strong message to those who are in the position to disseminate information widely, that they must exercise a F proper degree of care and diligence not to injure others, (see *Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1)* [2012] 10 MLJ 203; [2012] 1 LNS 296).

[72] I find it helpful to refer to a passage in *Gatley on Libel and Slander* where G it is provided that:

> Aggravated Damages. The conduct of the defendant, his conduct of the case, and his state of mind are all matters which the plaintiff may rely on as aggravating the damages. It is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and H conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite of or the manner of committing the wrong may be such as to injure the plaintiffs feelings of dignity and pride … the conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for aggravated damages, includes the failure to I make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of prolong or hostile cross-examination of the plaintiff … the general conduct either of the preliminaries of the trial itself in manner calculated to attract wide publicity; and persecution of the plaintiff by other means.

[73] See also the case of *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22; [2000] 6 CLJ 433 at p 462.

[74] In the present case, I find that the imputation made against the plaintiff through the publication of the libellous statement was serious in nature so as to impute that the plaintiff was corrupt, dishonest, a fraud, untrustworthy and had committed a fraudulent breach of trust. It must be borne in mind that the libellous statements were published repetitiously. Even though the publication was not distributed to the general public, all the members of the church were given access to the publication upon request. I acknowledge that the plaintiff in this case has no prominent standing as a businessman, a politician or even an artist. She was not even a member of the church. However, her husband, brother and her family were devout followers of the church. The effect of these publications will surely affect her, putting her in ridicule or contempt in the mind of the members of the church as being a fraud and untrustworthy. Despite several requests for the church to clear her name, nothing was done by the church. The FFT which was established to investigate the discrepancies in the accounts of TE conducted a flawed and biased investigation. The alleged final FFT report was mentioned but never produced by the defendants. The fact that the cheque was issued to Richard Lee was never disputed yet the imputation was made against the plaintiff. Furthermore, Richard Lee was never called to testify. There was no clarity as to the plaintiff's innocence nor was there any suggestion for the church to clear her name which has been tainted. No apology was ever issued. The plaintiff through her earlier appointed solicitor had issued a letter to the defendants requesting the defendants to issue an apology letter but no action was taken. The plaintiff then had no other recourse than to bring this matter to trial in order to clear her name. Of course, court process is a lengthy and costly one. In addition, the conduct of the defendants up until the trial was indifferent towards the imputation made against the plaintiff.

CONCLUSION

[75] Based on all of the above, I hereby allow the plaintiff's claim as prayed. I am satisfied that based on the circumstances of the case that the amount of RM50,000 and RM20,000 are to be awarded as general damages and aggravated damages to the plaintiff respectively and costs of RM25,000 to be paid to the plaintiff.

Claim allowed.

Reported by Afiq Mohamad Noor